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Supreme Court of the United States

MARINE TRANSIT CORPORATION, and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, claimant,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY.

October Term, 1931
No. **172**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

HORACE L. CHEYNEY,
Counsel for Petitioner.

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October Term, 1931
No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of the Marine Transit Corporation, individually, and the tug *Gerald A. Fagan*, by the Marine Transit Corporation, respectfully shows to this Court:

This is a petition for a writ of certiorari to review a decision, in admiralty, of the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decree of the United States District Court for the Southern District of New York.

This petition involves, among other things, questions of the constitutionality and construction of the United States Arbitration Act of February 12, 1925. For convenience we are attaching a copy of the Act as an appendix hereto.

The headings which are there inserted are not contained in the original Act. They are taken from the United States Code Annotated and are inserted for convenience in reference.

About July 28, 1928, Dreyfus & Company received at Buffalo, New York, in bond, for export, a shipment of grain from Fort William, Ontario, by a lake vessel. This shipment was stored at Buffalo in the American Elevator, on July 28, 1928 (fol. 492).

About three weeks later, on August 17, 1928, Dreyfus & Company entered into a written agreement with the Marine Transit Company, whereby the latter agreed to furnish insurable canal tonnage for carriage, from Buffalo to New York, of 200,000 bushels of wheat. Dreyfus & Company agreed to pay freight thereon at the rate of 6¼ cents per bushel (fol. 441).

That contract provided that it should be subject to the New York Produce Exchange Canal Grain Charter Party No. 1 as amended (fol. 442). That form of Grain Charter contained the following provision (fol. 596):

> "DISPUTES. All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange, whose decision shall be final and binding."

About September 13, 1928, 19,200 bushels of grain, part of said shipment of 200,000 bushels, were loaded upon the boat *Edward A. Ryan*, at Buffalo, which had been provided by the Marine Transit Corporation for the carriage of grain under the said contract.

The boat *Ryan* was placed in a fleet with other boats, including the boat *John E. Enright*, which was taken in tow by the tugboat *Gerald A. Fagan*.

While the boat *Ryan* was in tow of the tugboat *Gerald A. Fagan*, on the New York Barge Canal, some mishap occurred in which the boat *Edward A. Ryan* sustained damage in consequence of which it sank with a cargo of wheat on board.

On December 14, 1928, Dreyfus & Company filed a libel in the Southern District of New York in admiralty against the Marine Transit Corporation, in *personam*, the tug *Gerald A. Fagan* in *rem* and the boat *John E. Enright* in *rem*.

A claim was made for the tug *Gerald A. Fagan*, by the Marine Transit Corporation, and a stipulation for value was filed by it, as claimant, in the sum of $26,000 with the Continental Casualty Company, as stipulator.

As the Marine Transit Corporation was sued only in *personam* no stipulation was required of it and none was ever given by it.

Answers were filed by the various respondents. On August 20, 1929, the libellant made a motion for an order referring the disputes between the libellant and the Marine Transit Corporation, the tug *Gerald A. Fagan* and the barge *John E. Enright* to the Committee on Grain of the New York Produce Exchange for arbitration (fol. 75). After hearing, COXE, *J.*, signed an order granting the motion as to the Marine Transit Corporation, only, and denying it to the tug *Gerald A. Fagan* and the barge *Enright*.

On September 6, 1929, an order was entered resettling the order of August 28, 1929, and providing that the Marine Transit Corporation should submit to arbitration before the Committee on Grain of the New York Produce Exchange "any and all issues under the contract dated August 17, 1928, between the Marine Transit Corporation and

Louis Dreyfus & Company for the transportation of 200,000 bushels of wheat from Buffalo to New York" (fol. 82).

Thereafter, under that order the parties mentioned in it appeared before the Grain Committee of the New York Produce Exchange composed of five members (fol. 89). Hearings were had before that committee of five members (fol. 39) at which evidence in behalf of both parties was introduced.

On December 20, 1929, four of said committee signed an award in favor of the libellant and against the Marine Transit Corporation for the sum of $23,016 plus interest amounting to $1,668.66 (fol. 496). This award was not signed by Mr. Walter Trap, one of the members of the Grain Committee, who had taken part in the hearing. There is nothing in the record to show why the award was not signed by him.

Thereafter, on December 23, 1929, counsel for the libellant made a motion in the District Court to confirm that award (fol. 499). Opposing affidavits were filed. After hearing, that motion was granted and a decree was entered confirming the award of the arbitrators and providing that the libellant should recover from the Marine Transit Corporation the sums mentioned in the award (fol. 640).

Although the District Court had denied the motion to submit the issue as to the liability of the tug *Gerald A. Fagan* to arbitration and although there had never been any hearing or trial as to its liability nor any decree against it, nevertheless the decree above mentioned provided that execution should issue against the stipulation of the tug in the following language (fols. 644, 645):

"Further ordered that unless the Marine Transit Corporation, respondent, cause payment to be made within ten days after service of a copy of this order, with notice of entry on proctors for respondent, execution issue against the Marine Transit Corporation and Continental Casualty Company, the stipulator for cost and value, their goods, chattels and lands, to satisfy this decree."

In other words, the Court ordered that execution should issue against the stipulator or the tug, although no decree was entered against it and solely on account of the decree against the Marine Transit Corporation in *personam*.

A motion was made for an order restraining the libellant from recovering from the claimant of the tug *Gerald A. Fagan* or its stipulators under the decree already mentioned. After hearing, this motion was denied in a memorandum by CAFFEY, *J.* (fol. 667).

A formal order was then entered denying the motion and further ordering that the libellant may recover "of and from the Marine Transit Corporation or its stipulators" (fol. 676).

An appeal was taken from the decree of the District Court to the Circuit Court of Appeals which affirmed the decree of the Court below in an opinion by MANTON, *C. J.*

After that decision was handed down a conference was had between MANTON, *J.*, and the proctors for the various parties as to that portion of the opinion relating to execution against the stipulators of the tug *Gerald A. Fagan*.

Subsequently the following letter was received by counsel for the various parties:

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND JUDICIAL DISTRICT

Chambers of
MARTIN T. MANTON,
U. S. Circuit Judge,
New York City

May 30, 1931

Dreyfus v. *Marine Transit*

Macklin, Brown, Lenahan & Speer, Esqs.,
Horace L. Cheyney, Esq.
New York City

Otto & Lyon, Esqs.,
George V. A. McCloskey, Esq.,
New York City

Gentlemen:

I have examined Mr. Cheyney's complaint as to the opinion in the above entitled case, and have decided to let it stand, without change or amendment.

Respectfully,

MARTIN T. MANTON
Circuit Judge.

The petitioner submits that a writ of certiorari should issue in this case because the questions involved are important and of general public interest.

The questions involved are the constitutionality of the Act, its interpretation and the failure of the Court to follow the well established principle of law by decreeing that execution should issue against the stipulator for the tug, although no decree was ever entered against its principal, the tug.

The question of the constitutionality of the Arbitration Act goes to the very foundation of the powers of the inferior federal courts.

Under the decision of the Circuit Court of Appeals, those courts are mere creatures of Congress, which may not only establish them, in accordance with the constitutional provisions, and provide for their jurisdiction when established, but may also, when established, deprive them of all judicial power whatsoever, by taking away the power to hear and determine and convert the judges thereof into mere ministerial or clerical officers.

Our contention is that when inferior federal courts are created by Congress in accordance with the provisions of the Constitution, that the judicial power, including the power to hear and determine, is automatically vested in them under the Constitution and that Congress cannot deprive those courts, when created, of that power.

The second question as to the constitutionality of the Act is whether Congress can confer the jurisdiction of a court of equity upon an admiralty court, as the Arbitration Act gives the district courts, in an admiralty proceeding, the power to enforce specific performance of the agreement for arbitration, a purely equitable remedy.

The Circuit Court of Appeals has sustained the validity of this provision of the Act upon the ground that Congress was enlarging the jurisdiction of the courts of admiralty. That decision is contrary to the well established rule declared by this Court in many cases that Congress cannot enlarge the jurisdiction of the admiralty courts.

So far as concerns the construction of the Act, it may be said that it was not skilfully prepared and is full of defects and ambiguities. As this is the first decision of

any appellate court upon the construction of the Act, the petitioners cannot ask for a review of the decision of the Court below on the ground of conflicting decisions, but as the decision of the Circuit Court of Appeals, in many respects, seems to be in conflict with the Act, if permitted to stand, it is probable that other courts will reach different conclusions and that situation should be avoided by a review of the present decision.

A question of amendment of the Act has been raised before a Committee of the American Bar Association, but it would seem useless for that body to consider amendments until the Act is clearly and definitely construed by this Court.

Amongst other important questions arising as to the construction of the Act, are the following:

First: Whether any district court has power to enter a decree upon the award of arbitrators unless the parties by their provisions have agreed that judgment shall be entered upon it, as provided in Section 9 of the Act.

The Circuit Court of Appeals did not pass upon this question, although it argued both in the briefs and orally.

Second: Whether Section 8 of the Act gives a court of admiralty the power to enter a decree upon the award of arbitrators in any case before it whether or not the parties have agreed that a decree should be entered upon the award, under the provisions of Section 9 of the Act.

Third: If a court of admiralty has that power under the provisions of Section 8 of the Act, whether the power is confined to cases in *rem* only or whether the Court can enter a decree in an action in *personam* as well.

Fourth: Whether the right to arbitration depends upon the contract between the parties to the suit, that is, whether that contract is for interstate or intrastate carriage only or whether the right to arbitration depends upon the nature of the shipment itself, irrespective of the contract for carriage made between the parties.

Fifth: Whether in the absence of any provision of the Act, the award of the arbitrators must be unanimous.

Sixth: Whether under the provisions of the Act, the right to arbitration is confined to those matters which arise out of the terms of the contract itself or whether arbitration may be ordered for loss of the cargo.

The third branch of the case, that is, the decision that execution shall issue against the stipulation for the release of the tug *Fagan* although it is not a party to the arbitration proceeding and no decree has ever been entered against it, may not seem at first glance to be of general public interest, yet going deeper, it is of general public interest because it raises the question whether the Circuit Court of Appeals can disregard the well established principles of law and order execution against a stipulator whose principal has not been held at fault.

Different underwriters are involved in this case. The provision in the decree that execution should issue against the stipulator for the tug *Fagan*, although no decree was ever entered against the latter, has produced a situation of confusion as to the liability of various underwriters, which should be removed by this Court.

WHEREFORE your petitioners pray that this Honorable Court will be pleased to issue its writ of certiorari to the United States Circuit Court of Appeals for the Second

Circuit requiring it to certify and send to this Court a complete transcript of the record and all proceedings in said cause to the end that it may be reviewed and determined by this Honorable Court.

MARINE TRANSIT CORPORATION, personally
and as claimant of tug *Fagan*,
by
HORACE L. CHEYNEY,
Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HORACE L. CHEYNEY, being duly affirmed, deposes and says:

That he is counsel for the petitioner, Marine Transit Corporation, and the tug *Gerald A. Fagan.* That he has read a copy of the transcript of record which accompanies this petition, being the transcript of record in the case at bar; that he has carefully examined the foregoing petition for a writ of certiorari; that the allegations and matters stated in said petition are true to the best of his knowledge, information and belief; and that in his opinion, the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

HORACE L. CHEYNEY.

Affirmed to and subscribed before
me this 18 day of June, 1931.

BRIEF IN SUPPORT OF PETITION.

POINT I.

A writ of certiorari should be granted to review the question of the constitutionality of the Arbitration Act and the decision of the Court below that Congress has full control over all the inferior federal courts and can, by legislation, deprive them of their judicial powers.

Section 1 of Article 3 of the Constitution, provides as follows:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Section 2 of Article 3 of the Constitution provides that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction".

It is clear that under the provisions of Section 1 of Article 3 that Congress cannot vest any judicial power in any body other than a court duly created under the provisions of the Constitution.

It is well settled that there can be no delegation of the judicial power of the federal courts either by the courts themselves, or by Congress.

The question of the constitutionality of the Arbitration Act may be approached from two points of view.

In the first instance, it may be regarded as an attempt to delegate the judicial power of the courts, and in the second instance, it may be regarded as an attempt to confer judicial power upon some body other than the court.

From either point of view, the Act would seem to be unconstitutional.

The right to hear and determine is of the very essence of the judicial power.

The Act completely deprives the courts of that fundamental right. All that a court of admiralty can do under the decision of the Court below, after ordering arbitration, is to confirm the award of the arbitrators and enter a decree upon it.

The provisions of this Act, therefore, provide for a complete delegation of the judicial power of the courts to the arbitrators.

The question may be approached from the other point of view, that is, as an attempt to vest judicial power in some body other than a court. Viewed from that standpoint the Act is invalid because all judicial power under the Constitution must be vested in the courts.

It is too clear for argument that an arbitrator is not a court, within the meaning of the language of the Constitution.

But the Circuit Court of Appeals has said that arbitration is directed merely to the remedy, and, being a procedural statute was within the power of Congress to enact. There is no question but that arbitration does go to the remedy.

But the decision of the Court below goes even further and holds that under the Constitution, the inferior federal courts are purely the creatures of Congress and that the latter, having the power to regulate procedure, may deprive those courts of the power to hear and determine upon the ground that such legislation relates merely to procedure.

If this view is correct, then Congress may provide that in all jury trials, at common law, the jury shall sit alone without the presence or guidance of the judge.

If Congress has this broad power, as asserted by the Circuit Court of Appeals, then Congress can provide that every admiralty suit shall be referred to a commissioner to hear and determine.

If this contention is true, Congress may go even further and may provide that every admiralty suit brought in the City of New York, shall be referred to the Grain Committee of the New York Produce Exchange, to hear and determine.

Unquestionably, Congress may regulate the procedure of the courts in some respects, but that right is not without limit. It may not under the guise of a statute relating to procedure deprive the courts of their judicial power.

The decision of the Court below is that the judges of the inferior federal courts derive all of their powers from Congress and that the latter may deprive them of the power to hear and determine and convert them into purely ministerial or clerical officers whose sole duty is to enter a decree, upon the determination of some other body.

This view seems to be in direct conflict with the provisions of Section 1 of Article 3 of the Constitution that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time establish.

It must be conceded that the power to hear and determine goes to the very foundation of the judicial power and taking away the power to hear and determine the judicial power becomes completely destroyed.

The Court below attempts to sustain this doctrine by referring to the decisions of this Court holding that while

the Constitution provides that the federal courts shall have jurisdiction over certain classes of cases, that provision is dormant until Congress acts and the federal courts have only such jurisdiction as Congress grants.

The case of *Jackson* v. *Steamboat Magnolia*, 20 How. 296, is cited in support of that argument.

There is no question as to the law upon this subject, as it is well settled that the inferior federal courts have only such jurisdiction as Congress may grant to them.

But it by no means follows that when those courts are created by Congress, that the latter may deprive them of their judicial power and convert them into purely ministerial officers.

The decision of the Court below upon this point is that Congress has complete power and control over the inferior federal courts.

This view presupposes that those courts derive no powers whatsoever from the Constitution.

That theory is, we submit, unsound and not in accordance with the law.

It is true that the establishment of the inferior federal courts and their jurisdiction is solely within the power of Congress, but we submit that when those courts are created by Congress, that they are automatically vested with the judicial power under the provisions of Section 1 of Article 3 of the Constitution, and that while Congress may fail to create the inferior federal courts, that when created, it cannot deprive them of the judicial power under the Constitution.

In other words, Congress, under the Constitution, has the power to create the inferior federal courts, but when so created, they have a status under the Constitution with which Congress cannot interfere.

The theory of the Court below is that the inferior federal courts derive all their jurisdiction and powers from Congress is not in accordance with the authorities upon this subject.

In *Mayor, etc. of Nashville* v. *Cooper*, 6 Wall. 247, Mr. Justice SWAYNE stated the law upon this subject as follows:

> "As regards all Courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the Court the capacity to take it and an Act of Congress must have supplied it. Their concurrence is necessary to vest it."

That statement was referred to with approval by Mr. Justice SUTHERLAND in *Kline* v. *Burke Construction Co.*, 260 U. S. 226.

The same view has been set forth in the following cases:

United States v. *Burlington & Henderson County, etc.*, 29 Fed. 331;
Harrison v. *Hadley*, 2 Dill. 229, Fed. Cases 6137;
Manley v. *Olney*, 32 Fed. 708;
Schrauger & Johnson v. *Phillips Bernard Co.*, 240 Fed. 131;
In re Hollins, 229 Fed. 349;
Farrell v. *Waterman S. S. Co.*, 291 Fed. 604.

It is said in the opinion of the Circuit Court of Appeals, as follows:

> "The validity of a clause providing arbitration under the New York Arbitration Act was held no constitutional impediment in the Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109."

That case arose under the arbitration laws of the State of New York and does not concern the Federal Arbitration Act at all. We find nothing in the opinion sustaining the statement that this Court held that there was no constitutional impediment against an arbitration clause. The question was not raised in this Court or discussed in its opinion. That case concerned only the question whether an arbitration could be had under the New York statute in the courts of that State upon a maritime contract. The Court of Appeals of New York held that such contracts fell exclusively within admiralty jurisdiction, but this Court, reversing the Court of Appeals, held otherwise.

POINT II.

A certiorari should be granted because the decision of the Court below that Congress has power to enlarge the admiralty jurisdiction by conferring upon the district courts in admiralty the power of a court of equity to enforce a contract, is in direct conflict with the uniform decisions of this Court that Congress cannot enlarge the jurisdiction of the admiralty courts.

Section 4 of the Arbitration Act provides that any federal court in which an action is pending, may, upon petition, enter an order for arbitration if the parties have by their contract, agreed that the matters in dispute shall be arbitrated.

The power to enforce specific performance of a contract is certainly one which is not vested in a court of admiralty, under the well established law as to its jurisdiction.

While the admiralty courts may apply equitable principles in cases falling within their jurisdiction, yet they have not the characteristic powers of a court of equity.

The Eclipse, 135 U. S. 599.

They cannot enforce specific performance.

Kynoch v. *The S. C. Ives*, New. 205; Fed. Cases No. 7958;
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109.

The Court below, however, has sustained the power of an admiralty court to enforce specific performance by saying as follows (fol. 241):

> "The Act does not deprive the District Court of jurisdiction, but it seems to enlarge that jurisdiction so as to embrace the enforcement of arbitration agreements not only by ordering such arbitration to proceed, but by entering a decree upon this award."

This statement is in direct conflict with the uniform decisions of this Court that Congress cannot enlarge the jurisdiction of the courts of admiralty and that the determination of what matters fall within the jurisdiction of the court of admiralty, is a purely judicial question.

The law upon this subject is stated as follows by Mr. Justice BRADLEY in *The Lottawanna*, 21 Wall. 558:

> "The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or Act of Congress can make it broader, or (it may be added) narrower,

> than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received, as law in the maritime usages of this country, and on such legislation as may have been competent to affect it."

A similar statement of the law was made by Mr. Justice Holmes in *The Black Heath*, 195 U. S. 361.

It is said in the opinion of the Court below as follows:

> "A power under S. 8 to enforce specific performance in a contract is but a remedy incident to jurisdiction under the Act. (Hartford Accident v. Southern Pacific, 273 U. S. 277; Morse Dry Dock v. Northern Star, 271 U. S. 552.)"

There is nothing in the decisions of this Court in those cases supporting the contention that a court of admiralty has power to enforce specific performance as a remedy incident to its jurisdiction.

The case of *Morse Dry Dock Company* v. *Northern Star*, *supra*, involved only the construction of the Preferred Mortgage Act, and largely the question of relative priority of preferred mortgages and liens.

The constitutionality of the Preferred Mortgage Act was not even suggested in the case. Its constitutionality is still open to question. It is unnecessary at this time to enter into any discussion of its constitutionality, but in view of the previous decisions of this Court upon the subject, the constitutionality of some of its provisions is subject to grave doubt.

Nor is there anything to be found in the decision in the *Hartford Accident* case, *supra*, which supports this theory

that specific performance is only a remedy incident to jurisdiction.

That case was one of limitation of liability. This Court held that a court of admiralty, in working out its jurisdiction, acquired the right to marshal all claims and that upon dismissing the petition, it might, at its discretion, retain jurisdiction over the whole subject matter. But we find nothing in the case which supports the theory propounded by the Court below.

Probably the latter had in mind the right to grant an injunction in limitation proceedings, restraining claimants from bringing suit elsewhere, than in the court in which the limitation proceeding is pending.

But that provision does not empower an admiralty court to enforce specific performance as an incident to its jurisdiction.

This Court long ago held that a proceeding for limitation of liability is within the constitutional grant of power to Congress to establish courts of admiralty and maritime jurisdiction.

Norwich & N. Y. Transportation Co. v. *Wright*, 13 Wall. 104.

But in the present case, the court of admiralty has no power to enforce specific performance nor can Congress grant that right.

As this Court held that the limited liability law was within the power of Congress to enact, the provision for an injunction was one only for the protection of the jurisdiction of the Court. In such proceedings, a monition issues against all parties to bring their claims into the limitation proceedings.

Every court, including a court of admiralty, has inherent power to punish for contempt and the injunction issued in the limitation proceedings is merely notice to all parties that they must bring their claims within the admiralty and not elsewhere and that they shall be subject to contempt if they act otherwise.

POINT III.

The decision of the Circuit Court of Appeals is in direct conflict with the terms of the Arbitration Act which provides in Section 9 that a judgment may be entered upon the award of arbitrators only if the parties have so agreed by their contract for the arbitration.

Section 9 of the Arbitration Act provides that judgment may be entered upon the award of the arbitrators only "if the parties in their agreement have agreed that a judgment of the Court shall be entered upon the award."

There was no agreement of that kind in this case, as the contract provided for no more than the arbitration of disputes under the contract (fol. 596).

It is our understanding that the framers of the Federal Arbitration Act in this respect followed that provision of the arbitration law of the State of New York, now contained in Section 1449 of the Civil Practice Act, which provides that judgment may be entered upon the award of arbitrators only where the parties have so agreed by their submission.

This question was fully argued in the Circuit Court of Appeals, both orally and in the briefs, but notwithstanding its importance in the case, it is not even referred to in the opinion.

It has been contended that Section 8 of the Act relating to procedure in admiralty cases is entirely independent of the other sections of the Act and the provisions of Section 9, therefore, do not apply to those cases within the admiralty jurisdiction under Section 8.

This contention is that once a court of admiralty has acquired jurisdiction, its actions are not affected by the other sections of the Act and it may do just about as it pleases.

While it is not directly stated in the opinion of the Circuit Court of Appeals, that it upheld this theory that Section 8 was independent of all of the other provisions of the law, yet its decision is consistent only with that theory.

The fallacy of that theory is too obvious for much discussion.

Two illustrations will suffice to show its error.

If Section 8 is entirely independent of all other sections of the Act, then the District Court sitting in admiralty had no power to order arbitration at all as Section 8 by its provisions grants no such power.

It is clear that a court of admiralty has no inherent power to force an arbitration agreement and therefore if it has that power, it must be conferred by some provision of the Act.

That power is granted, not by Section 8, but by Section 4 of the Act, which specifically provides that any court having jurisdiction "at law, in equity, or in admiralty may enter an order for arbitration upon the agreement".

It must be admitted, therefore, that in this respect, at least, the provisions of Section 8 are not entirely independent of the provisions of the other section of the Act but are connected with them. The Circuit Court of Appeals so admits as it says that the power to enforce arbitration is given by Section 4, although Section 8 does not refer to it.

If this contention that Section 8 of the Act is independent of the other sections and therefore, the provisions of Section 9 that judgment may be entered upon award only where the parties have so agreed, has no application to suits in admiralty commenced under the provisions of Section 8, then a court of admiralty has no power to vacate, modify or correct an award upon the grounds set forth in Sections 10 and 11 because under the provisions of Section 9, those sections apply only to proceedings under it.

If the contention that under the provisions of Section 9 a judgment may be entered upon award only where the parties have so agreed do not apply to suits in admiralty, then a most anomalous condition is created.

If the libellants had brought suit at law against the Marine Transit Company upon the contract involved in this case, no judgment could have been entered upon the award under the provisions of Section 9 because the parties did not stipulate that judgment should be entered.

But according to this theory, the libellants are entitled to have a decree entered because the suit is in admiralty when one could not have been entered in an action at law.

Certainly, neither Congress nor the framers of the Act intended to bring about such a result.

The purpose of Section 8 of the Act is clear enough.

The sole and clear purpose of Section 8 was to provide that if the subject matter of the suit was such as to fall within the jurisdiction of the admiralty that a suit might be commenced in the manner peculiar to the admiralty, namely, by an action in *rem*.

Where the admiralty court has acquired jurisdiction by a seizure in *rem*, all of the provisions of the Act are applicable to the suit.

POINT IV.

The decision of the Circuit Court of Appeals is in conflict with the provisions of the Arbitration Act, because if Section 8 is independent of the other sections of the Act, it confers no power to enter a decree upon the award except in actions in *rem* or upon seizure of property in an action in *personam* and this case involves neither of the situations.

In order to properly understand this point, it is necessary to make a short restatement of facts as the opinion of the Circuit Court of Appeals gives an erroneous impression of them. It would be inferred by anyone reading the opinion of the Circuit Court of Appeals that some action in *rem* was involved in its decision.

Such was not the case.

The Marine Transit Corporation entered into a written contract with Dreyfus & Co. whereby it agreed to carry 200,000 bushels of wheat from Buffalo to New York (fol. 73). In part fulfillment of that contract, the Marine Transit Corporation received on board the *Edward A. Ryan,* 19,200 bushels of wheat (fol. 493). That boat was taken in tow with some others by the tug *Gerald A. Fagan.* Some mishap occurred in the New York Barge Canal whereby the *Ryan* sank with its cargo.

Dreyfus & Company filed a libel to recover for the loss of cargo against the following parties:

(1) Marine Transit Corporation in *personam;* (2) Tug *Gerald A. Fagan* in *rem;* (3) The barge *John E. Enright* (another boat in the tow) in *rem.*

The libel as to the tug *Fagan* and barge *Enright* was not based upon any contract at all but sounded in tort only as the libel alleged certain specific acts of negligence on the part of each of them. (See libel, fols. 19 *et seq.*)

A motion was made by libellant to send to arbitration the issues under the answers of all of the respondents. This action was properly denied by Coxe, *J.*, who sent to arbitration only the question of the liability of the Marine Transit Corporation in *personam* and denied the motion as to the actions in *rem* against the tug *Fagan* and the barge *Enright*.

The arbitration proceeding was as to the Marine Transit Corporation only in *personam* (fol. 88) and the arbitrators made an award against the Marine Transit Corporation only.

There never was any adjudication of the acts in *rem* against the tug *Fagan* although the opinion of the Circuit Court of Appeals indicates otherwise.

Assuming, therefore, that under the provisions of Section 8, a court of admiralty can enter a decree contrary to the provisions of Section 9, where the parties have not stipulated that a judgment shall be entered in an award, can it enter a decree in an action in *personam* if no property has been attached?

No property of the Marine Transit Corporation was attached and could not have been under the admiralty procedure, because it was alleged in the libel that it was a corporation existing under the laws of the State of New York.

Section 8 of the Act does not cover the entire field of admiralty jurisdiction, as it is limited to two phases of it; one, a proceeding in *rem* by seizure of the vessel, and two,

by an attachment of property of the respondent upon suit in *personam*, where an attachment will lie. It does not cover ordinary action in *personam*, where there is no attachment of property.

Therefore, if a court of admiralty, under the provisions of Section 8, has power to enter a decree upon the award in certain cases, notwithstanding the parties have not so agreed, it is clear that it is granted no such power by that section to enter a decree in an action in *personam* where no property has been attached because the provisions of Section 8 do not include actions in *personam*, where no seizure of property has been made.

POINT V.

This Court should review the decision of the Court below that it is not necessary that the award should be signed by all the arbitrators.

The arbitration was had before five members of the Grain Committee, including Mr. Walter Trapp (fol. 89). Mr. Trapp did not sign the award.

The Act contains no provision upon this subject although the Arbitration Act of the State of New York, which we understand was largely followed in the preparation of the Federal Act, does contain a provision that a majority of the arbitrators may make an award.

With this provision of the New York statute before them, the framers of this Act inserted no similar provision and it is a fair presumption, therefore, that they intended that the award of the arbitrators should be unanimous.

It is said in the opinion of the Court below, that it is not necessary that the award should be unanimous and that "a committee of four out of five signed the award" (Rec., p. 242).

Aside from any inference that it was the purpose of Congress to require unanimity of award, we submit that in the absence of any provision on the subject, unanimity is necessary.

A board of arbitrators is very similar to a jury and in the absence of any provision on the subject in the Arbitration Act, it is to be fairly assumed that Congress intended that the award of arbitrators, like the verdict of a jury, should be unanimous.

POINT VI.

The decision of the Court below that an admiralty court has jurisdiction to enforce an arbitration of a contract for intrastate carriage is erroneous because under Sections 1 and 2 of the Act, the courts have jurisdiction only over maritime transactions and contracts involving either interstate or foreign commerce.

This point raises the same question which is involved in some of the other points, namely, whether the provisions of Section 8 are entirely independent of the provisions of all other sections of the Act, because not specifically referred to in it, or whether its provisions must be read in connection with the other sections.

The following statement is made in the opinion of the Circuit Court of Appeals:

> "The parties claiming to be aggrieved at bar were the appellees as they applied under S. 8 of the arbitration act because of the appellant's failure, neglect or refusal * * * to arbitrate under a written agreement for arbitration (S. 4) and nothing in either section 4 or 8 confines such written agreements for arbitration to agreements involving maritime transactions in a limited sense."

This decision of the Court is contrary to the decision of NIELDS, *D. J.* (District of Delaware), in *Zip Mfg. Co.* v. *Pep Mfg. Co.*, 44 Fed. (2d) 184. That was a patent case and a motion was made for arbitration, which was denied.

It was held by the Court that all sections of the Act were to be construed together and harmonized if possible and that no arbitration could be ordered except in cases falling within the terms of Sections 1 and 2 of the Act.

Section 1 of the Act defines maritime transactions as "charter parties, etc." or any other matters in foreign commerce, which if the subject of controversy, would be embraced within admiralty jurisdiction. In that section, commerce is defined as meaning interstate or foreign commerce. Neither of these sections apply to purely intrastate transactions or commerce. What is the purpose of the insertion of Sections 1 and 2 of the Act, unless its other sections were to be construed in connection therewith?

It was argued by the appellee in the Court below that the purpose of these two sections was merely to validate arbitration agreements so that they could be enforced anywhere. In other words, the contention was that the purpose of Congress in inserting the provisions of Sections 1 and 2 was to validate and confer jurisdiction upon the High

Court of Justice of England, amongst others, if the parties saw fit to bring suit in England.

The opinion of the Court below concedes that the provisions of Section 8 are not complete and do not confer power to order arbitration and that that power is conferred only by Section 4 of the Act, which must be read in connection with Section 8.

The question arises why if Section 4 must be read in connection with the provisions of Section 8, why Sections 1 and 2 must not also be read in connection with it.

As we have argued heretofore, the plain purpose of Section 8 was merely to permit actions to be brought in a court of admiralty in *rem* or by the attachment of property and it does not in any way give unlimited jurisdiction to the admiralty; in fact, it does not relate to jurisdiction over the subject matter at all.

Although the Court below has found that the provisions of Sections 1 and 2 have no bearing whatsoever upon admiralty actions under Section 8, the opinion further proceeds to consider the question whether or not this contract fell within the provisions of Sections 1 and 2.

It is said in the opinion of the Circuit Court of Appeals, as follows:

> "But it is said that the grain was not established to be for foreign shipment."

We have made no such contention. What we did argue was that the contract made between these parties was for intrastate carriage and that under the provisions of Sections 1 and 2, the question was as to the character of the contract and not the nature of the shipment.

The facts of the case are very simple and may be briefly restated.

The grain which was lost was carried from Fort William, Ontario, to Buffalo by lake steamer, which arrived at Buffalo about July 24th, 1928. There is no evidence of any through bill of lading in the case.

The steamer carrying the cargo to Buffalo issued a local bill of lading.

The grain was stored in the American elevator at Buffalo on July 28, 1928 (fol. 492), and nearly three weeks later, on August 17, 1928, Dreyfus & Co. and the Marine Transit Corporation entered into a contract for the carriage of 200,000 bushels of wheat from Buffalo to New York.

The contract made was for purely intrastate carriage from Buffalo to New York (fol. 439), and a bill of lading was issued by the Marine Transit Corporation for the carriage of the cargo which was lost, to New York (fol. 487).

It may well be that for certain purposes, that this shipment so far as concerned Dreyfus & Company, was a foreign one, but that fact has no bearing upon the right to arbitration under the provisions of the Act because it confers power to enforce arbitration only where the contract made between the parties relates to foreign or interstate commerce.

The nature of the shipment has no connection whatsoever with the right to arbitration under the Act.

It is also said in the opinion that the Barge Canal was a waterway for foreign commerce. There is no question about that fact, but it has no bearing whatsoever upon the right to arbitration under the Act. That concerns only the admiralty jurisdiction.

POINT VII.

A certiorari should be granted because the decision that execution should issue against the stipulator for the tug, although no decree was entered against the tug, is clearly erroneous and is in conflict with the uniform law upon the subject.

The statements in the opinion of the Circuit Court of Appeals as to the proceedings are misleading. It might be inferred from those statements that the tug *Fagan* was a party to the arbitration proceedings, which was not a fact.

The opinion also fails to make clear that the Marine Transit Corporation appealed in two different capacities. First, from the judgment against it in *personam,* and second, as claimant of the tug *Fagan.* The latter appeal related to the decree of the District Court that execution should issue against the stipulators for the tug.

The tug *Fagan* was sued in *rem.* A stipulation for its value in the sum of $26,000.

Libellant made a motion to refer the issues as to the Marine Transit Corporation, in *personam,* and the tug *Fagan* in *rem,* to arbitration. The Court granted the motion as to the Transit Corporation, in *personam,* and denied it as to the tug. The arbitration, therefore, proceeded against the Marine Transit Corporation in *personam* only. The arbitration was had as to it only. The award was against it only. The Court, in confirming the award, entered a decree against it only.

But, nevertheless, the Court, by its decree, directed that execution should issue against the stipulator for value of

the tug, although the tug was not a party to the arbitration proceeding, nor was there any decree against it.

This portion of decree violates not only the uniform practice of the admiralty, but all of the well-established principles of law. Nothing is better settled than that a stipulator or surety is liable only for the default of its principal.

In this case, the principal of the stipulator was the tug *Fagan* and its liability has never been adjudged in any way whatsoever, nor has any decree been entered against it.

The Court says in the opinion that the libel and seizure was a proceeding in *rem*, which it undoubtedly was, but that does not alter the situation as the action in *rem* was never tried.

It is said in the opinion of the Circuit Court of Appeals that the stipulation given for the release of the tug was a substitute for the vessel which made the stipulation liable to the exercise of every authority in the power of the Court which it could exercise if the *res* was still in the Court's custody.

There is no question about this principle of law, but it has not the slightest application to the facts of this case. If no stipulation had been given for the release of the tug and it had remained in the custody of the Court, the latter would have been powerless to enter any decree against it without hearing and determination of its liability.

The law and practice upon this subject is too well established to require much discussion.

In actions in *rem*, the final decree runs against the vessel with provision for execution against the stipulator for its release. (See form Benedict's Admiralty, Vol. 2, pp. 490-491.)

No decree can be entered against the claimant of a vessel, personally, but if he has signed the stipulation, he is, of course, liable upon it.

Atlantic Mut. Ins. Co. v. *Alexandre*, 16 Fed. 379.

It so happens in this case that the Marine Transit Corporation, which was sued in *personam*, was also the owner of the tug *Fagan* and made claim for it. But that does not alter the situation. It had two distinct identities in the case.

The stipulator cannot be bound except by the terms of his stipulation, and by the stipulation it did not agree to pay upon default of the Marine Transit Corporation. It agreed to pay only in the event of a final decree against the tug *Fagan* and there has been none.

The opinion of the Circuit Court of Appeals indicates a misapprehension of the facts of the case, and if there was any such misapprehension, it was removed at the conference with MANTON, *J.*, quoted in the petition. But as shown by his letter of May 20, 1931, to counsel, the error has still remained.

There was one statement in the opinion apparently relating to this point to which attention is called because it shows an erroneous impression as to arbitration under the Act.

It is said in the opinion as follows (Rec., p. 244):

> "Section 8 of the Arbitration Act contemplated that the liability arbitrated between the parties was a liability that attached to the tug as well as to the owner in personam."

In other words, this is a decision that notwithstanding the District Court declined to submit the issue as to the

tug's liability to arbitration because it was not a party to the contract, nevertheless the tug was a party to the arbitration proceedings.

The fallacy of this decision is so obvious that it requires no consideration.

It is true that Section 8 of the Arbitration Act covers arbitration where there is a proceeding in *rem* against a vessel.

But the construction of that section by the Circuit Court of Appeals apparently is that the courts have power to order arbitration in any case in *rem* in admiralty whether any agreement for arbitration exists or not.

Clearly the Act cannot be given any such construction.

Owing to the fact that there are different underwriters involved in this case, the decree providing that execution should issue against the stipulator of the tug, has created a situation of confusion. This confusion should be removed by the application of the proper principles of law, and it is submitted that as this error has not been corrected below, that it should be corrected by this Court.

LASTLY.

It is respectfully submitted that a writ of certiorari should be granted to review the decision of the Circuit Court of Appeals in this case.

HORACE L. CHEYNEY,
Counsel.

APPENDIX.

THE UNITED STATES ARBITRATION ACT

Act of Congress, February 12, 1925, C. 213, Sec. 41, Title 9, U. S. Code of Law.

An Act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED:

Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Sec. 2. Validity, irrevocability and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Sec. 3. Stay of proceedings where issue therein is referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Sec. 4. Failure, etc., to arbitrate under agreement; petition to United States Court having jurisdiction to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, safe for such agreement, would have jurisdiction

under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement PROVIDED, That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agree-

ment for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Sec. 5. Appointment of arbitrators or umpire.

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Sec. 6. Application heard on motion.

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Sec. 7. Witnesses before arbitrators; fees; compelling attendance.

The arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in

writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court and for the district in which such arbitrators, or a majority of them, are sitting, may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Sec. 8. Proceedings began by libel in admiralty and seizure of vessel or property.

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Sec. 9. Award of arbitration; confirmation; jurisdiction; procedure.

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sections. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the Court.

Sec. 10. Same; vacation; grounds; rehearing.

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Sec. 11. Same; modification or correction; grounds; order.

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Sec. 12. Notice of motions to vacate or modify; service; stay of proceedings.

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Sec. 13. Papers filed with order on motion; judgment; docketing; force and effect; enforcement.

The party moving for an order confirming, modifying or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk;

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Sec. 14. Citation of title.

This Act may be referred to as "The United States Arbitration Act."

Sec. 15. Contracts not affected.

All Acts and parts of Acts inconsistent with this Act are hereby repealed, and this Act shall take effect on and after the 1st day of January next after its enactment, but shall not apply to contracts made prior to the taking effect of this Act.